Nos. 88-1872 and 88-2074

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CYNTHIA RUTAN, *et al.*,
Petitioners,
v.
REPUBLICAN PARTY OF ILLINOIS, *et al.*,
Respondents.
and
MARK FRENCH, *et al.*,
Cross-Petitioners,
v.
CYNTHIA RUTAN, *et al.*,
Cross-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONERS/ CROSS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 90 national and international unions having a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* supporting petitioners/cross-respondents with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

As stated in *Branti* v. *Finkel*, 445 U.S. 507, 513 (1980), this Court held in *Elrod* v. *Burns*, 427 U.S. 347 (1976), "that the newly elected Democratic sheriff of Cook County, Ill., had violated the constitutional rights of certain non-civil-service employees by discharging them 'because they did not support and were not members of the Democratic Party and had failed to obtain the sponsorship of one of its leaders.' 427 U.S., at 351." The common ground between the two separate opinions that supported *Elrod's* holding was their reliance on *Perry* v. *Sindermann*, 408 U.S. 593 (1972). In *Perry* this court established that even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech. *Id.* at 597-98, quoted in *Branti*, 445 U.S. at 514-15. The *Branti* court, following *Perry* and *Elrod*, ruled that two assistant public defenders could not be discharged by the recently appointed public defender, a Democrat, on the ground that they were Republicans. The court below held that *Elrod* and *Branti* are applicable only to discharges or to employment decisions which are the "substantial equivalent to a dismissal." 868 F.2d at 949-52, following *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).

I.

The framework for analysis of public employees' First Amendment claims is stated in *Connick* v. *Myers*, 461 U.S. 138, 142 (1983), which followed *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968):

> Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

And, as just noted it is settled law that even though a person has no "right" to a valuable governmental benefit

and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *Perry*, 408 U.S. at 597.

Given this standard, it is clear that the plaintiffs and others in their position have a constitutionally-protected interest. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a "valuable governmental benefit." With respect to applicants for new employment, *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), is directly in point, for it was there held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights. The right to vote and to associate with the political party of one's choice clearly "rank among our most precious freedoms." *Williams* v. *Rhodes*, 393 U.S. 23, 30, (1968). See also *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976); *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973).

As this case stands, there can be no doubt that both the freedom of political association and to vote according to one's choice are *severely burdened* by respondents' system. Employment benefits are made on the approval of the Governor's Office of Personnel, which makes use of the individual's (and his relatives') voting records and financial and other support of the Republican Party and its candidates, and the approval of state or county Republican Party officials. The party, in turn, determines the individual's and his family's voting history, past financial contribution and volunteer work for the Party and its candidates, and the future potential of such support. R.A. 7.

The right not to associate with and support a political party in these ways is clearly established. See *Tashjian*, 479 U.S. at 216, n.7; *Abood* v. *Board of Education*, 431 U.S. 209, 234-36 (1977). It bears emphasis, that Re-

spondents' political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candidates, or opponents of the ruling faction within the Republican Party. Any such activity would almost certainly disqualify the applicant in the minds of the Republican Party officials and the Governor's Office of Personnel.

II.

The court below opined that if the rights recognized in *Elrod* and *Branti* were recognized with respect to promotions, transfers and hires, "it would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. The Court's concern is wholly unjustified because the complaint challenges a general *system* as applicable to all personnel decisions covering tens of thousands of state employees, rather than independent individual employment decisions. Moreover, the Court erred in relying on *Bishop* v. *Wood*, 426 U.S. 341 (1976) and *Connick* v. *Myers*, *supra*. *Bishop* did not involve a claimed violation of First Amendment rights. *Connick* strongly affirmed the rights of government employees not to be penalized for engaging in First Amendment activities on matters of public concern or for participating in political affairs.

The court below also relied on the governmental interest articulated by Justice Powell in his dissents in *Elrod* and *Branti*—that the support which a patronage system gives to political parties helps to maintain a stable political system. While "[m]aintaining a stable political system is, unquestionably, a compelling state interest," *Storer* v. *Brown*, 415 U.S. 724, 736 (1974), *Storer* itself shows by example that effectuating this interest does not automatically outweigh all First Amendment rights. See *id.* at 740; *Williams* v. *Rhodes*, 393 U.S. at 31-32; *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989). Thus, if *Branti* leaves any room for considering that interest, then at the very least the

complaint must be reinstated and the case remanded for the thorough and painstaking inquiry which Judge Ripple outlined in dissent below. 848 F.2d at 1414-15.

But we submit that *Branti* does *not* leave open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. The Court explained in *Branti*:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

In this analysis, the distinction the court below would draw between this case and *Branti* is simply irrelevant. Political patronage decisionmaking favors a "partisan interest" rather than a "governmental interest" whether that decision results in the discharge of an employee or the denial of a promotion or transfer or a failure to hire. Thus, where political party affiliation is *not* relevant to "maintaining governmental effectiveness and efficiency," 445 U.S. at 517, there is *no* legitimate overriding government interest that justifies patronage decisionmaking. On the contrary, allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure.

ARGUMENT

1. Because the district court dismissed the complaint in this case, for present purposes the "facts" consist of the allegation of that complaint concerning the political patronage system in the State of Illinois challenged as violative of the First Amendment rights of government employees and applicants for government employment. We therefore begin by setting out the essential allegations concerning the operation of that system:

> 11e. The "Governor's Office of Personnel" controls all hiring, transfers, promotions and other significant aspects of employment by approving or disapproving such transactions on an individual basis using the Executive Order as its authority.
>
> 11f. In making decisions regarding employment, promotion, transfer and other employment matters, Defendant Thompson's employees in the "Governor's Office of Personnel" are substantially motivated by political considerations. Such political considerations include whether the individual under consideration is Republican or a relative or friend of a Republican, is sponsored by an influential Republican, is a financial supporter of the Republican party or an influential Republican, is a friend or supporter of Defendant Thompson or is sponsored by those who are friends or supporters of Defendant Thompson or is sponsored by a member of the Illinois General Assembly who is deemed to be a friend or supporter of Defendant Thompson.
>
> 11g. In giving or refusing approval of a particular individual for a particular employment position the "Governor's Office of Personnel" makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level.

> 11h. The Republican Party screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potention of such financial support, the potential of future "volunteer" work by the applicant in behalf of the Republican Party and its candidates. Attached hereto and incorporated herein as Exhibit B is the application form for promotion in State government employment used by the Republican Party in Sangamon County. [R.A. 7-8.] [1]

2. In *Connick* v. *Myers*, *supra*, 461 U.S. at 142, this Court set forth the framework for analysis of the First Amendment claims of public employees:[2]

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980). Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568.[3]

Accordingly, we first discuss the interests of the employees who are affected by the challenged patronage system

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[1] "R.A." refers to the Appendix to the State Respondents' Brief in Opposition. Exhibit B appears at R.A. 24.

[2] Except as the context indicates otherwise, the word "employee" will encompass applicants for employment throughout this brief.

[3] This case differs from *Pickering* and *Connick* in that efficiency of the public service is not one of the countervailing considerations relied on by the court below.

as alleged in the complaint herein, and then discuss the countervailing state interests which have been asserted in defense of this practice.

(a) *Elrod*, *supra*, and *Branti*, *supra*, struck down patronage practices which threatened (or effectuated) the discharge of public employees because of their political affiliations. The court below held that the principle of those decisions is to be limited to discharges or "practices that 'can be determined to be the substantial equivalent of dismissal.'" 868 F.2d at 949, quoting *Delong* v. *United States*, 621 F.2d 618, 624 (4th Cir. 1980).[4]

We submit that this blanket restriction on First Amendment claims, which automatically protects patronage practices which affect employment decisions such as the refusal to hire, promote or transfer is inconsistent with the theoretical underpinnings of *Elrod* and *Branti*. As noted in the Introduction, those decisions were predicated on the broad principle established in *Perry* v. *Sindermann*, *supra*, 408 U.S. at 597-98, where the Court reasoned:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the

[4] The court below stated that the

> Sixth Circuit implicitly recognized the distinction between patronage discharges and less burdensome patronage practices in *Avery* v. *Jennings*, 786 F.2d 233 (6th Cir.), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986), which upheld patronage hiring practices against First Amendment attack. [868 F.2d at 952.]

The court below misunderstood *Avery*. The Sixth Circuit did not there approve the blanket use of political tests for hiring. Rather, that court concluded that there "is a significant difference between a patronage system that intentionally uses a strict political test as the standard for hiring or firing decisions, . . . and a patronage system that relies on family, friends and political allies for recommendations." 786 F.2d at 237.

> government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.
>
> We have applied this general principle to denials of tax exemptions, *Speiser* v. *Randall*, [357 U.S. 513, 526], unemployment benefits, *Sherbert* v. *Verner*, 374 U.S. 398, 404-405, and welfare payments, *Shapiro* v. *Thompson*, 394 U.S. 618, 627 n.6; *Graham* v. *Richardson*, 403 U.S. 365, 374. But, most often, we have applied the principle to denials of public employment. [Citations omitted.] We have applied the principle regardless of the public employee's contractual or other claim to a job. [Citations omitted.]
>
> Thus, the respondent's lack of contractual or tenure "right" to re-employment for the 1969-1970 academic year is immaterial to his free speech claim.

With respect to applicants for new employment, *Torcaso* v. *Watkins*, *supra*, 367 U.S. 488, is directly in point. There, it was held that the First Amendment precludes the state from denying a commission as notary public to an individual on grounds which abridge his First Amendment rights (in that case, freedom of religion): "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Id.* at 495-96.

The patronage practices at issue here (and the claims of the individual plaintiffs) also encompass promotions and transfers and rehires. Although no First Amendment case in this Court deals with precisely such employment decisions, the constitutional standard enunciated in *Perry* reaches "valuable governmental benefit[s]," 408 U.S. at 597, generally and is *not* limited to continued employment alone, *id.* The *Perry* Court's opinion—quoted

above—could not be clearer in that regard. It is difficult, if not impossible, to envisage a situation in which a promotion, a transfer—at least a transfer sought by the employee—or a rehire is *not* a valuable governmental benefit.

This is not to say that the precise nature of the benefit may not be pertinent to the balance which is to be struck down between the employees' interest and those of the government. Our point at this juncture of the argument is simply that the court below erred in holding that an employee (or applicant for employment) who challenges a patronage practice is cut off at the threshold unless he or she has been discharged actually or constructively.

It is incontrovertible, too, that the patronage system which is described in the complaint herein affects rights which "rank among our most precious freedoms." *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30. As Justice Black, speaking for the court, reminded:

> [W]e have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." [339 U.S. at 30-31, footnote omitted.]

The First Amendment right to support political parties was recently reaffirmed in *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1987):

> The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. *Elrod* v. *Burns*, 427 U.S. 347, 357 (1976) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes*, 414 U.S. 51, 57 (1973). [479 U.S. at 214.]

As this case stands, there can be no doubt that the freedom of political association and to vote according to one's choice are *severely burdened* by this patronage system. Employment benefits are made to depend on the approval of the Governor's Office of Personnel, which "makes use of the individual's voting records and voting records and support of the individual's relatives and the individual's financial and other support of the Republican Party and its candidates, and the approval of Republican Party officials at the state or county level." R.A. 7. The Republican Party, in turn, "screens prospective employees by determining at the local or county level the voting history of the person and that of relatives of such persons, the past financial support of the Republican Party and its candidates, the future potential of such financial support, the potential of future 'volunteer' work by the applicant in behalf of the Republican Party and its candidates." *Id.* See pp. 6-7, *supra*.

In *Tashjian*, the Court expressly recognized a First Amendment right not to register with a political party:

> [T]he requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the States requires regardless of the actual beliefs of the individual voter. Cf. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633-634 (1943). [479 U.S. at 216, n.7.]

So too, the right not to make a financial contribution to a political party is protected. *Abood* v. *Board of Education*, *supra*, 431 U.S. at 234-36. The Court there held that under the First Amendment, government employment may not be conditioned on payments to a labor organization to the extent that a portion of that organization's funds are used for partisan political expenditures. Given that decision, the right not to contribute to

an organization like the Republican Party which is devoted entirely to partisan political activities cannot be controverted.

Supporting a political party by providing personal time and effort to its causes, even more than registering as a party member or making a financial contribution, necessarily entails a public expression of agreement with the party which may be contrary to an individual's beliefs. Cf. *Tashjian*, *supra*. So too, it will often be highly offensive to a citizen to come before a political party official to whose views he is opposed, to satisfy whatever demands that official may make. Certainly this infringement on personal liberty is incomparably greater than the impersonal requirement of displaying the state motto on an automobile license plate, which was struck down in *Wooley* v. *Maynard*, 430 U.S. 705 (1977) or the financial contribution requirement which was disapproved in *Abood*, *supra*.

As a matter of settled law, then, the challenged patronage system clearly violates the petitioners' rights *not* to associate politically with the Republican Party. It is equally true, and it bears emphasis, that this political patronage system imposes an equally heavy burden on the *affirmative* right to engage in political activity in favor of the Democratic party and its candiates. See *Elrod*, 427 U.S. at 355-56 (plurality opinion). Even a Republican party official who would be willing to approve the hire or promotion of an individual who has not voted for or has not expressed his willingness to perform services for or contribute money to the Republican party would be exceedingly unlikely to approve an applicant who was active in the Democratic opposition to Republican party candidates. Indeed, given the partisan political character and purpose of the system, a Republican party official who gave his endorsement to a supporter of the Democratic party would be subject to serious criticism if not worse within his party constituency and would be unable

to justify his recommendation to the Governor's Office of Personnel which controls appointments. The same would likely be true with respect to employees who support primary candidates from a different faction of the Republican party for personal or ideological reasons, or otherwise oppose the incumbent Republican party officials.

(b) We turn next to the interests which, in the court of appeals' view, "strongly weigh against broadly expanding [beyond dismissal and constructive discharge] the rule *Branti* and *Elrod* enunciated." 868 F.2d at 953.

The first of those considerations is that "[r]ecognizing the rights asserted by plaintiffs in this case would potentially subject public officials to lawsuits every time they make an employment decision." 868 F.2d at 954. We submit that this consideration is invalid with respect to the complaint in this case because granting relief herein (and *a fortiori* reinstating the complaint) would not have the consequences which the court below anticipated, and because that court misunderstood the two decisions cited as supporting its conclusion.

The complaint challenges the legality of a general *system* as applicable to all personnel decisions covering tens of thousands of state employees (R.A. 6, ¶ 11a). The respondents have not contended (and indeed could not at this procedural stage) that the adverse personnel decisions affecting the petitioners were *not* made pursuant to that system. That challenge does not require judicial evaluation of the legality of individual personnel decision where the basis of the decision is in dispute, but only of a system which on its face makes political party affiliation an employment consideration. Thus even if the court of appeals' concern might be entitled to a particular individual personnel decision, that concern is simply inapposite here.

The court of appeals' concern is, in any event, invalid even in the context of individual personnel decisions. The

burden on public employers and on the litigation system which the court below feared is not different from that imposed by any of the well-recognized causes of action making it unlawful to refuse a valuable government benefit for invidious reasons. And the right at stake here is no less precious.

Indeed, *Pickering* v. *Board of Education*, *supra*, and *Perry*, *supra*, most assuredly hold that employees may challenge their discharges on the ground that the discharge is based on the exercise of their First Amendment rights. There is no evidence that the courts have been faced with any significant amount of litigation based on spurious claims of political motivation even with respect to discharges where, on the court below's own assumption, the harm to the employees is the most serious, and the incentive to conjure up claims would be the greatest. This experience serves to allay the lower court's "doubt" as to the ability of public employees in order to overturn entirely proper adverse personnel decisions.

In this connection, the court below wrote: "Political issues and beliefs do not come in neat packages wrapped 'Democratic' and 'Republican.' A wide variety of issues, interests, factions, parties, and personalities shape political debate." 868 F.2d at 564. With this we agree. But it simply does not follow that adverse personnel decisions motivated by disagreement with employees on these issues, etc., are not protected by the First Amendment. On the contrary, such cases as *Pickering*, and *Perry* show that while the First Amendment is particularly solicitous of participation in partisan politics its protections extend further. And the court below errs when it says "it is questionable whether 'politics' could be meaningfully separated from other considerations such as friendships, compatibility, and the enthusiasm to pursue the stated job goals." *Id.* Politics is "meaningfully separated" from the "other considerations" referred to by the First Amendment itself.

The court below also quoted and relied on *Bishop* v. *Wood*, *supra*, 426 U.S. at 349, where this Court said: "Federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." However, *Bishop* is clearly inapposite because the plaintiff employee in that case raised *no* First Amendment issue. Rather, the employee contended that his discharge deprived him of a liberty interest which was subject to due-process safeguards; one component of his claim was that the reasons given for his discharge were false. The sentence quoted by the court below was part of a discussion which rejected that argument.[5] *Bishop* thus applied the rule that a public employee must demonstrate the loss of a "liberty" or "property" interest in order to have a constitutional right to a hearing; that rule had been established in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and its companion case, *Perry*, 408 U.S. at 599. But, as we have seen, *Perry* also held that a public employee may challenge adverse employment decisions "because of his constitutionally protected speech or associations," regardless of the public employee's "contractual or other claim to a job." *Id.* at 597, quoted at p. 9, *supra*.

Whereas *Bishop* v. *Wood* is simply not in point, *Connick* v. *Myers*, *supra*, the other decision cited by the court below, is squarely inconsistent with that court's thesis that the complaint herein must be dismissed in order to avoid "an unprecedented intrusion into the political affairs of the states and other branches of federal govern-

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[5] See also the immediately preceding sentences:

> The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake. [426 U.S. at 349, footnote omitted.]

ment." 868 F.2d at 954. We begin by placing the phrase which the court below quotes from *Connick* into its context. The relevant portion of this Court's opinion in that case states:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the commonsense realization that government offices could not function if every employment decision became a constitutional matter. [461 U.S. at 143, footnote omitted.]

As this Court also wrote in *Connick*:

> *When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. [461 U.S. at 146, emphasis added.]

Association (or nonassociation) with a political party, which is at stake in this case, is incontrovertibly on the "citizen" side of the line which was articulated in *Connick* and its antecedents. Justice White explained for the *Connick* Court:

> In all of . . . the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" *by the fear of discharge from joining political parties* and other associations that certain public officials might find "subversive." The explanation for *the Constitution's special concern with threats to the right of citizens to participate in political* affairs is no mystery. . . . [T]he Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amend-

> ment values,'" and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). [461 U.S. at 144-45, emphasis added.]

The entire Court agreed on this basic principle; see also 461 U.S. at 161-62 (dissenting opinion).

The other consideration which the court below believed outweighs the public employee's interest in being protected "against the more limited burdens imposed by patronage practices other than dismissing or constructively discharging an employee," 868 F.2d at 953, is that articulated by Justice Powell in his dissenting opinions in *Elrod* and *Branti*. The court below quoted approvingly the following passage from Justice Powell's *Branti* dissent:

> Broad-based political parties supply an essential coherence and flexibility to the American political scene. They serve as coalitions of different interests that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue. The quality of political debate, and indeed the capacity of government to function in the national interest, suffer when candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to over-arching issues of domestic and foreign policy." [*Branti*, 445 U.S. at 532 (Powell, J., dissenting).]

As the Court reiterated at the last Term, "[m]aintaining a stable political system is, unquestionably, a compelling state interest." *Eu* v. *San Francisco Cty. Democratic Central Committee*, 109 S.Ct. 1013, 1022 (1989), citing *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). In *Storer* the Court held that the prevention of "splintered parties and unrestrained factualism" justified provisions of California's Elections Code which denied ballot position to an independent candidates for elective public office who

had a registered affiliation with a qualified political party within one year prior to the immediately preceding prior election. *Id.*

But in *Storer* the Court also reinstated the claims of two other prospective candidates for office who challenged California's requirement that an independent candidate for President or Vice President must obtain signatures and a nominating petition for not less than 5% nor more than 6% of the entire vote cast in the preceding general election and to obtain such signatures in a specified 24-day period. The Court remanded those claims "to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President" by this requirement. *Id.* at 740. See also *Williams* v. *Rhodes*, 393 U.S. at 31-32, and *Anderson* v. *Celebrezze*, 460 U.S. 780, 801-802 (1983) (holding that the State's interest in political stability cannot justify protecting the Republican and Democratic parties from external competition by the virtual exclusion from the ballot of political candidates from other parties). So too, in *Eu* itself the Court held that the interest in political stability did not justify the challenged California statute which significantly burdened a political party's First Amendment rights because the State "never adequately explains how banning Parties from endorsing or opposing primary candidates advances that interest." 109 S.Ct. at 1022.

In short, the interest in political stability does *not* automatically outweigh all First Amendment rights; indeed *Elrod* and *Branti* at a very minimum establish that proposition. On this record, consisting as it does of the complaint alone, not nearly enough is known about the operation of the patronage system, its impact on the political rights of public employees and its effect, if any, on preserving political stability to justify the decision below. The point was ably made by Judge Ripple in his dissent from the panel opinion:

> [W]e know very little, on the basis of the complaint alone, about the impact of this political patronage system on the first amendment rights of job applicants. We also know very little about the justification for this political patronage system. In my view, this case should be remanded to the district court. There, after adequate development of the record, the district court will be able to accomplish several tasks that are essential to a full and fair analysis of this case: 1) a thorough examination of the operation of *this* patronage system and the effect of that operation on the plaintiff; and 2) a thorough examination of the justifications for this particular system proffered by the defendants. [848 F.2d at 1414, emphasis in original. See also *id.* at 1414-15.]

Accordingly, Judge Ripple concluded the complaint should be reinstated and the case remanded to the district court for a full development of the facts. This is the very least that is required. See also *Storer*, *supra*; cf. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948).

(c) To this point we have indulged the court of appeals' major premise: that *Branti* leaves open the possibility that there are classes of government positions as to which it is *improper* to take political party affiliation into account in making *discharge* decisions, but it is *proper* to take such affiliations into account in making hiring, transfer, and promotion decisions. As we have shown, even on that premise, reversal of the decision below and remand for development of the facts are in order.

As we now show, the court of appeals' premise is wrong. While *Branti* arose in the context of a discharge, its rationale invalidates political party patronage decisionmaking across the board except where "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. And for the excepted class of government positions it is entirely con-

stitutional to take political party affiliation into account in making discharges as well as in making other personnel decisions.

Branti states the limit on the Constitution's protections of political party affiliation in the following terms: "[I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." 445 U.S. at 517. And the *Branti* Court went on to explain:

> The plurality [in *Elrod*] emphasized that patronage dismissals could be justified only if they advanced a governmental, rather than a partisan, interest. 427 U.S. at 362. That standard clearly was not met to the extent that employees were expected to perform extracurricular activities for the party, or were being rewarded for past services to the party. Government funds, which are collected from taxpayers of all parties on a nonpolitical basis, cannot be expended for the benefit of one political party simply because that party has control of the government. *The compensation of government employees, like the distribution of other public benefits, must be justified by a governmental purpose.* [445 U.S. at 517, n.12 (emphasis added).]

We cannot see any escape from the proposition that if the benefit of political patronage decisionmaking to the favored political party—and to its stability—is a "partisan interest" and not a "governmental interest" that overrides First Amendment rights in the discharge context, that benefit is, once again, a mere "partisian interest" and not a "governmental interest" in the hiring, transfer and promotion contexts. And if that is so, we can see no escape from the conclusion that political patronage decisionmaking in those regards is unconstitutional. For the reasons we have given, these are certainly "valuable governmental benefits" and denying such

benefits on political party affiliation grounds certainly adversely affects the exercise of the most basic of First Amendment rights *to some extent*. That being so, patronage decisionmaking passes constitutional muster if, and only if, justified by a legitimate overriding *governmental* interest. And *Branti* states that where political party affiliation is *not* relevant to the "effective performance of the public office involved" there is *no* such legitimate overriding government interest that justifies patronage decisionmaking.

Nor, we submit, is there any sound reason to seek to escape *Branti*'s logic. The *Branti* rule not only serves government interests but through its stated limit serves the most important interests of the political parties by saving out a host of the most important and desirable government offices from the First Amendment's proscription on patronage decisionmaking. And, as the passage from *Branti* quoted above recognizes, going further and allocating governmental resources *purely* in the interest of a partisan political party grants the favored party an advantage that threatens the legitimacy of our governmental structure. That harm greatly outweighs the supposed gains in political party stability and in avoiding litigation over government personnel decisions the court of appeals found of such moment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed, and the case remanded to the District Court with directions to reinstate the complaint and for further proceedings consistent with the constitutional analysis set forth herein.

Respectfully submitted,

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